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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/694,654	10/27/2003	Lynn Irwin	364106/0344	4006

7590 03/09/2007  
Steven B. Pokotilow  
Stroock & Stroock & Lavan LLP  
180 Maiden Lane  
New York, NY 10038

EXAMINER
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VALENTI, ANDREA M

ART UNIT	PAPER NUMBER
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3643

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	03/09/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

**Office Action Summary**

Application No.

10/694,654

Applicant(s)

IRWIN ET AL.

Examiner

Andrea M. Valenti

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 22 December 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-67 is/are pending in the application.
- 4a) Of the above claim(s) 37-66 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-4, 9-22, 24, 26-36, 67 is/are rejected.
- 7) ☒ Claim(s) 5-8, 23 and 25 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

**DETAILED ACTION*****Double Patenting***

The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

Claims 1-4, 9-22, 24, 26-36, 67 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claims 1-13 of U.S. Patent No. 6,729,266 to Gabriel et al. Although the conflicting claims are not identical, they are not patentably distinct from each other because both the pending application and the patent claim a ventilated cage and rack system for housing at least one cage assembly, said system comprising: a ventilated rack, the rack including at least one air exhaust plenum, and at least one canopy disposed within said rack, the canopy being adapted to position said cage assembly below the canopy while maintaining a gap between the top of said cage assembly so as to permit air to be drawn into the air

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exhaust plenum from the interior of said cage assembly through the top of said cage assembly and to also permit ambient air to be drawn across the top of said cage assembly into the air exhaust plenum, but the patent is silent on claiming wherein said cage assembly comprises at least one of a first cage having a first width and a plurality of second cages having a second width, said second width being less than said first width. However, it would have been obvious to one of ordinary skill in the art to include different size cages of different dimensions to accommodate different size animals in an efficient manner. The modification is merely a change in size and making the rack adjustable to accommodate a different size, which both modification do not present patentably distinct limitations.

***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Claims 1, 3, 10-22, 24, 26-36, and 67 are rejected under 35 U.S.C. 102(b) as being anticipated by U.S. Patent No. 6,158,387 to Gabriel et al.

Regarding Claims 1, 20-22 and 67, Gabriel teaches a ventilated cage and rack system for housing at least one cage assembly, said system comprising: a ventilated rack (Gabriel #12) having a height, width and depth wherein the rack is constructed and arranged to support a plurality of cages along the width of the rack (Gabriel Fig. 1), the rack including at least one air exhaust plenum (Gabriel Fig. 3 #42) running along the

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width of the rack, and at least one canopy (Gabriel Fig. 3 #30) supported by said rack, the canopy having a length and width, the canopy being adapted to receive one or more said cage assemblies below the canopy while maintaining a gap between the canopy and top of said cage assembly so as to permit air to be drawn into the air exhaust plenum from the interior of said cage assembly through the top of said cage assembly and to also permit ambient air to be drawn across the top of said cage assembly into the air exhaust plenum (Gabriel Fig. 3 arrows), wherein said cage assembly comprises at least one of a first cage having a first width (Gabriel #20a); side plates (Gabriel Fig. 2 #33a and 35a).

Regarding Claims 3 and 24, Gabriel teaches the canopy comprises a channeling element (Gabriel channels is created by the lid of the cage and the top and side of the canopy fig. 3) adapted to facilitate said drawing of ambient air across said top of said cage assembly into the air exhaust plenum when said cage assembly comprises a plurality of said second cages.

Regarding Claims 10 and 27, Gabriel teaches said canopy comprises a discrete reinforcement member (Gabriel Fig. 1 #19) disposed on a front edge of said canopy .

Regarding Claims 11 and 28, Gabriel teaches said canopy is attached to said air exhaust plenum and communicates with said air exhaust plenum through ducts (Gabriel Fig. 3 #43) in said air exhaust plenum.

Regarding Claims 12 and 29, Gabriel teaches said rack further comprises at least one air supply plenum (Gabriel Fig. 3 #40) and wherein said canopy positions said cage assembly to receive air from said air supply plenum.

Regarding Claims 13 and 30, Gabriel teaches the canopy further comprises a top plate, a left side wall and a right side wall (Gabriel Fig. 3 #31a, 32a, 34a).

Regarding Claims 14 and 31, Gabriel teaches the top and side plates are of substantially the same length as the length of said cage assembly in the rack (Gabriel Fig. 3).

Regarding Claims 15 and 32, Gabriel teaches wherein each of said side walls is substantially perpendicular to the top plate (Gabriel Fig. 3 #31a, 32a, 34a).

Regarding Claims 16 and 33, Gabriel teaches said top plate and said left and right side walls are formed as a unitary member (Gabriel Fig. 3 #31a, 32a, 34a).

Regarding Claims 17 and 36, Gabriel teaches each said cage of said cage assembly further comprises a bottom portion with side walls and a filter cap, the filter cap having side walls which overhang the side walls of the bottom portion of the cage when the filter cap is mounted on the bottom portion, and wherein each of said left and right side walls of the canopy further comprise a lip extending perpendicularly from the side plate so that the lips extend underneath at least a portion of the overhanging side walls of the filter cap of the second cage (Gabriel Fig. 3#39 and 29 and #24).

Regarding Claims 18, 19, 34 and 35, Gabriel teaches said at least one canopy is substantially comprised of a transparent material; said at least one canopy is substantially comprised of clear plastic (Gabriel Col. 6 line 21-24).

Regarding Claim 26, Gabriel teaches each of said two second cages are secured within said ventilated rack by a corresponding cage lock, said cage locks being

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disposed on said ventilated rack such that said cage locks are disposed about non-adjacent sides of said cages (Gabriel Col. 12 line 9-18 and Col. 14 line 42-55).

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 2, 4, and 9 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,158,387 to Gabriel et al in view of U.S. Patent No. 4,343,261 to Thomas.

Regarding Claim 2, Gabriel is silent on said plurality of second cages consists of two second cages (wherein the combined widths of the second cages positioned side by side along a width of the canopy is at or about the width of the canopy). However, Thomas teaches an animal cage and rack system with a first width cage and a plurality of second width cages that combined the widths of the second cage is at or about the width of the canopy (Thomas Fig. 2 and Fig. 1 #20 and 29). It would have been obvious to one of ordinary skill in the art to modify the teachings of Gabriel with the teachings of Thomas at the time of the invention since the modification is merely the selection of a known alternate equivalent cage configuration selected to accommodate a larger number of animals in an efficient manner.

Regarding Claim 4, Gabriel as modified teaches the canopy comprises a channeling element (Gabriel channels is created by the lid of the cage and the top and

side of the canopy fig. 3) adapted to facilitate said drawing of ambient air across said top of said cage assembly into the air exhaust plenum when said cage assembly comprises a plurality of said second cages.

Regarding Claim 9, Gabriel as modified teaches each of said two second cages are secured within said ventilated rack by a corresponding cage lock, said cage locks being disposed on said ventilated rack such that said cage locks are disposed about non-adjacent sides of said cages (Gabriel Col. 12 line 9-18 and Col. 14 line 42-55).

***Allowable Subject Matter***

Claims 5-8, 23, and 25 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

***Response to Arguments***

Applicant's arguments filed 26 September 2006 have been fully considered but they are not persuasive.

Applicant amended the independent claims in a manner that made the independent claims broader than previously presented. Applicant is now claiming a first cage having a first width at or about the width of the canopy and alternatively claiming a plurality of second cages of second widths. No longer is it necessary to have both dimensioned cages together but merely one or the other because applicant changed "and" to --or--. Thus all that is required is at least one cage having a first width to satisfy the limitations of the claim. The second cages of second widths are optional.



Applicant's arguments with respect to claims 2, 4, and 9 have been considered but are moot in view of the new ground(s) of rejection.

Adjusting the width of the rack to accommodate different size cages is an obvious modification for one of ordinary skill in the art. It is general knowledge in the art to put cages of different sizes on one rack as taught in U.S. Patent No. 6,588,371. Applicant has not structurally claimed the structural features that enable the canopy to accommodate different size cages. Applicant has not provided claim language that explicitly claims that the canopy sections remain a standard size for all of the canopy section and it is the structure of the canopy in combination with the structural features of the cage that enable two cages to be secured under one canopy section.

Examiner maintains that applicant has not patentably distinguished over the teachings of the cited prior art of record.

### ***Conclusion***

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

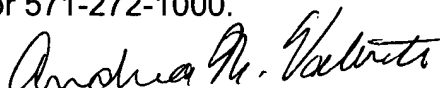
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extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Andrea M. Valenti whose telephone number is 571-272-6895. The examiner can normally be reached on 7:00am-5:30pm M-Th.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 571-272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

  
Andrea M. Valenti  
Primary Examiner  
Art Unit 3643

06 March 2007